

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN B. FOY,)	CASE NO. 1:14CV907
)	
)	
Plaintiff,)	JUDGE CHRISTOPHER A. BOYKO
)	
v.)	Magistrate Judge George J. Limbert
)	
CAROLYN W. COLVIN, ACTING)	<u>REPORT AND RECOMMENDATION</u>
COMMISSIONER OF SOCIAL)	<u>OF MAGISTRATE JUDGE</u>
SECURITY,)	
)	
Defendant.)	

This matter is before the undersigned on a motion to vacate the undersigned's September 2, 2015 Report and Recommendation filed by Plaintiff, John B. Foy ("Plaintiff"). ECF Dkt. #25. The undersigned issued a Report and Recommendation on Plaintiff's motion for attorney fees and Plaintiff asserts that the Report and Recommendation was premature and he still had time to file a reply brief. *Id.* Defendant, Carolyn W. Colvin, Acting Commissioner of the Social Security Administration ("Defendant" or "Commissioner"), has not filed a response to the motion.

On August 7, 2015, Plaintiff filed a motion for attorney fees under the Equal Access to Justice Act ("EAJA") after the Court adopted the undersigned's Report and Recommendation which recommended that the Court vacate the Commissioner's decision and remand Plaintiff's case to the Commissioner for further proceedings consistent with the Report and Recommendation. ECF Dkt. #s 20, 21. On August 21, 2015, Defendant filed a response brief opposing the number of hours and the hourly rate requested by Plaintiff's counsel. ECF Dkt. #23.

On September 2, 2015, the undersigned issued a Report and Recommendation recommending that the Court grant Plaintiff's application for fees in the amount of \$5,522.17,

some \$2,000.00 less than the \$7,562.00 requested. ECF Dkt. #24. The undersigned also recommended that the Court find that Plaintiff is entitled to fees for Appellate Assistant Shriver's services in the amount of \$280.00 at an hourly rate of \$40.00. *Id.*

On September 3, 2015, Plaintiff filed the instant motion, asserting that the undersigned's Report and Recommendation was premature and his reply was not due until September 8, 2015 pursuant to Local Rule 7.1(e), which he contends "allows 14 days for a reply after service of an opposition to a dispositive motion, to which 3 days are added because the service was by electronic means. Day 14 will be Friday, September 4, 2015, and September 7 is the Labor Day holiday. Rule 6(a)(6)(A)" ECF Dkt. #25 at 1. On September 8, 2015, Judge Boyko referred the instant Motion to the undersigned. ECF Dkt. #26.

The undersigned recommends that the Court GRANT Plaintiff's motion to vacate. ECF Dkt. #25. It appears that the undersigned's Report and Recommendation was premature in that it was filed on September 2, 2015 while Plaintiff still had time remaining in which to file his reply brief. Accordingly, the undersigned recommends that the Court GRANT Plaintiff's motion to vacate the undersigned's Report and Recommendation. ECF Dkt. #25.

Date: October 21, 2015

/s/George J. Limbert

GEORGE J. LIMBERT

UNITED STATES MAGISTRATE JUDGE

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within fourteen (14) days of service of this notice. Fed. R. Civ. P. 72; L.R. 72.3. Failure to file objections within the specified time WAIVES the right to appeal the Magistrate Judge's recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).